No. 994

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

WILLIAM ERIC FOWLER,
Petitioner,

v.

RAYMOND H. PILSON, ETHEL S. PILSON, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

WILLIAM ERIC FOWLER,
Petitioner,
v.
RAYMOND H. PILSON, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

The petitioner, William Eric Fowler, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above styled cause on October 13, 1941. (R. 24.)

Opinions Below.

The opinion of the District Court of the United States for the District of Columbia (R. 8-10) is not reported, and the opinion of the United States Court of Appeals for the District of Columbia decided October 13, 1941 (R. 16-24) is reported in Fowler v. Pilson, *et al.*, 123 F. (2d) 918.

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia was entered on October 13, 1941. A petition for a rehearing was denied on December 6, 1941 (R. 25). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925. (28 USCA §347.)

Statutes Involved.

The statutes involved are set forth in the Appendix, *infra*, p. 30.

Statement.

The following facts are not in dispute:

Petitioner is the assignee of a judgment rendered against defendant, Raymond H. Pilson, in 1930, by a court of the State of California, for $20,199.20, and attorney fees, costs, and interest at 7% from that date. (R. 8.) Petitioner filed this equity action, a creditor's bill, here in 1937, against said Pilson, a resident of California, and the trustees under the will of Pilson's grandfather, to impress a lien on the interest Pilson had in his grandfather's estate located here, which is not subject to be taken on legal process. (R. 2.)

Petitioner pleaded his California judgment against the debtor as evidence of the debt, and that execution was issued and returned wholly unsatisfied. (R. 8.) Pilson has had no property subject to levy since said judgment was obtained, except his interest in his grandfather's estate. (R. 3, 8.)

Petitioner further alleged that his judgment was enforceable when this action was brought; that §685 of the California Code (Appendix, *infra,* p. 30) provides that,—"In all cases the judgment may be enforced *or* carried into execution, after the lapse of five years * * *," and if Pilson then had property in California he could have had the judgment enforced or carried into execution, and it was not barred by §343 Title 24 of the D. C. Code, but was capable of being enforced in California (Appendix, *infra,* p. 30). (R. 2.)

Subsequent to bringing this action, petitioner discovered that Pilson had assigned in April 1932 his interest in said estate to his Mother, and filed an amended complaint making her a defendant, alleging that said assignments were made without consideration, and to defraud petitioner, and praying to have them decreed to be void. (R. 3.)

Defendants moved to dismiss the complaint and the amendments thereto on the ground that they did not state facts sufficient to entitle him to the relief prayed,—that petitioner was not a judgment creditor of any court of the District of Columbia, and had not exhausted his remedies at law. The Court overruled this motion (R. 3), because on the undisputed facts alleged petitioner has no plain, adequate remedy at law, as Pilson is a non-resident, and had no property when the complaint was filed or since, except his interest in his grandfather's estate. (Findings of Fact by the District Court, R. 8.)

Defendant's answers set up as a defense that the action was barred by Title 24, §343 of the D. C. Code, and §§335 and 336 of the California Code. (R. 3, 4; Appendix, *infra,* p. 30.)

Subsequent thereto, and in 1939, defendants and petitioner made a written stipulation whereby said Ethel S. Pilson waived any right by reason of said assignments and agreed not to make any claim thereunder, and that the assignments should be considered and treated as though they had not been made. The parties further stipulated that the sole issue to be litigated is whether said judgment is barred by the statute of limitations. (R. 5, 6.)

The Court held that petitioner's action is barred by the Statute of Limitations. (R. 10.)

A motion to have the decision set aside and to have judgment entered for plaintiff, or for a new trial, was filed December 27, 1939. While consideration of this motion was pending, Pilson filed a voluntary petition in bankruptcy on January 27, 1940, (R. 6), and in Schedule A-3 thereof he listed said judgment as a debt not in dispute (R. 6), and swore that his interest in the estate of his grandfather, Benjamin F. Pilson, was subject to an assignment to Ethel S. Pilson. (R. 9.)

Petitioner's motion was overruled, but leave to file a supplemental complaint was granted, which was filed on April 5, 1940.

The trustee in bankruptcy was permitted to intervene and pleaded the statute of limitations, and that the validity of said assignments is no longer an issue (R. 7); and that he adopted the stipulation between the parties including the provision that the sole issue was *whether the judgment* was barred by the statute of limitations. (R. 7.) The Pilsons filed no defense to the supplemental complaint other than to plead that Pilson was discharged in bankruptcy. *(Id.)*

The Court held that the *action* was barred by the statute of limitations. (R. 10.)

Judgment Below.

The Court of Appeals affirmed the decision of the District Court (R. 24), which held that this action is barred by the statute of limitations. (R. 10.)

Specification of Errors to Be Urged.

Petitioner urges that the Court of Appeals erred:

(1) In failing and refusing to confine the appeal to the sole issue as stipulated between the parties,—whether the judgment is barred by the statute of limitations, (R. 6), and in deciding the appeal upon issues withdrawn and excluded from consideration by the stipulation. *(Id.;* R. 17-23.)

(2) In holding that this is an action on the California judgment, and barred by the California statutes contrary to the California law. (R. 19, 21.)

(3) In holding that this suit could not have been maintained in California if brought there when begun here. (R. 19, 21.)

(4) In holding that the judgment could be enforced in California only by proceedings under §685 of the California Code, and by leave of Court. (R. 20, 21, 23.)

(5) In holding that "At the date of this suit, therefore, the California judgment was incapable of being otherwise enforced within the meaning of §343." (R. 19, 21, 23.)

(6) In holding that the judgment was dormant, and could not, therefore, be enforced here. (R. 22.)

(7) In failing and refusing to hold that this is not an action upon the California judgment but a creditor's action of original or exclusive jurisdiction in equity, and not subject to the statute of limitations, but controlled by the doctrine of laches and that it appears that there has been no laches in this case and that this action can be maintained. (R. 3.)

(8) In affirming the decision of the District Court. (R. 24.)

Questions Presented.

The questions at issue are whether the decision of the Court below in construing the California Statutes is in conflict with the decisions of this Court, and the Courts of California, including its highest court, in violation of §34 of the Federal Judiciary Act (28 USCA §725, Appendix, *infra*, p. 31) and of §1, Article IV of the Constitution of the United States; whether the Court below failed to give proper effect to an applicable decision of this Court; whether the Court below erred in deciding a question of general importance and substance relating to the construction and application of §343 of Title 24 of the District Code, a statute within the spirit and purpose of subdivision (c) Par. 5 of Rule 38 of this Court, basically relating to the construction and application of §1, Article 4 of the Constitution, which has not been but should be settled by this Court; and whether the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision.

Reasons for Granting the Writ.

In affirming the District Court's decision the Court below has so far departed from the accepted and usual course of judicial proceedings, and from that required by §1 of Article IV of the Constitution and §34 of the Federal Judiciary Act, in its construction of the California statutes, as to call for an exercise of this Court's powers of supervision; failed to give proper effect to an applicable decision of this court; has decided a question of general importance and substance relating to the construction and application of said §343, a statute within the purpose of said subdivision (c) Par. 5 of said Rule 38; and has decided important questions of local law in conflict with applicable local decisions.

(1) The Court below erroneously failed and refused to find that the sole issue here is whether the judgment is barred by the statute of limitations, and that it is not so barred, and based its decision on questions excluded from its consideration.

In so holding, the Court below failed to follow the decision of this Court in Tucker v. Alexander, 275 U. S. 228, 230, 231, that

> "All other questions", (than whether the judgment was barred by the statute), "were taken out of the case by stipulation" and the decisions in California,

(Bagley v. Ward, 37 Cal. 121; Metro-Goldwyn-Meyer Corp. v. Freer, 104 F. (2d) 892, C. C. A. 9; Phillips v. Patterson, 53 P. (2d) 807, Cal. App.; and of the District of Columbia; U. S. Casualty v. Dist. of Col., 107 F. (2d) 652, 71 App. D. C. 92.)

And the Court below farther failed and refused to hold that the judgment herein was not barred by the statute, and that petitioner was therefore entitled to recover, and in so holding and refusing to hold the court below failed to follow the decisions of the California courts, which hold that the judgment here was not barred or outlawed, (Powell v. Petch, 136 P. 55, 166 Cal. 329; Puckhaver v. Henry, 152 Cal. 419, 93 P. 114.; Pac. Gas • • • Co. v. Elks Duck Club, 103 P. (2d) 1030, 39.. Cal. App(2)562; Mason v. Cronise, 20 Cal. 212).

(2) The Court below held:

> "• • • that this suit could not have been maintained in California courts if it had been brought there when it was begun here," (R. 19),

because it held that it was an action upon the judgment rendered more than five years before, and barred by said §336; while the California and this Court decisions hold that:

> (a) "The bill • • • by a judgment creditor to subject to the payment of his demand property fraudulently transferred by the debtor is not, strictly speaking, an action upon his judgment. It is really an action for equitable relief against the obstruction caused by the transfer • • •". (Sewell v. Price, 128 P. 407, 409, 164 Cal. 265).
>
> "• • • this case is not to be treated as an application by a judgment creditor for the exercise of the ancillary jurisdiction of the court, to aid him in executing legal process, but comes under a head of original jurisdiction in equity. It is a bill by a creditor of a deceased debtor, against the administrator and a party who is fraudulently holding all the property of the deceased, which in equity should be applied to the payment of this debt, and the bill prays that the debt may be paid out of this fund." (Hagan v. Walker, 14 How. 29, 33, 14 L. ed. 312, 314, 315.)

It is not "an action to establish a new judgment liability, based upon the old; • • •." (Saunders v. Simms, 183 Cal.

167, 170, 190 P. 806). (See also Sefton v. San Diego Trust & Savings Bank, 106 P. 974, 977, Cal. App.; Richardson v. Michel, 113 P. (2d) 916, 920, Cal. App.; 7 Cal. Jur. §7, p. 796; Hagan v. Walker, 14 How. 29.)

(b) In so holding the Court below failed also to follow the California decisions which hold that the mere lapse of time does not render relief, such as sought by this action, unobtainable, but the creditor's own acts must have made the rendering of relief an injustice. The Court said in a case where it permitted the enforcement of a judgment after 14 years had elapsed:

> "* * * the judgment * * * was for money loaned * * * appellant, had never been satisfied * * *, and *no reason whatever appeared* why in equity and good conscience he should not be compelled to pay the same. The failure of plaintiff to earlier enforce the judgment * * * was entirely without prejudice to any of his legal rights, * * *. * * * the exercise of a sound discretion would require the enforcement of the judgment." (Doehla v. Phillips, 151 Cal. 488, 495, 91 P. 330.) (Italics ours.)

(See also McClelland v. Shaw, 23 Cal. App. (2d) 107, 72 P. (2) 225, delay of 9 years; Peers v. Stall, 32 Cal. App. (2d) 511, 90 P.2d 114, delay of 19 years, hearing by Supreme Court refused; 24 Cal. Law Review, p. 226.)

In Palace Hotel v. Crist, 45 P. (2) 415, 6 C. A. (2) 690, the creditor, 20 years after judgment was entered, was permitted to bring an action against the executors of the debtor estate, and to secure a new judgment for the amount of the debt, to be paid in the course of administration, citing Saunders v. Simms, 183 Cal. 167, 190 P. 806, 808, as a case on all fours with that under consideration.

In the accompanying brief, a list is given of eleven California cases where judgments were enforced which had been entered for more than 5 years before.

The time within which the Court may enforce or carry a judgment into effect is without limitations, (Doehla v. Phillips, 151 Cal. 488, 91 P. 330; 15 Cal. Jur. §257, p. 257.)

(c) The Court below also held that:

> "At the time of this suit * * * the California judgment was incapable of otherwise being enforced within the meaning of Section 343" (R. 23).

The Court below based this conclusion on the following conclusions stated by it:

> (1) "Liberally and most broadly interpreted, the statute" (said §685), "supports this view",—that it "provides a method of enforcing the judgment within the meaning of Section 343" (R. 20), but that
>
> "to give the words 'otherwise enforced' the broadest possible meaning would produce unusual, if not incongruous, results. * * * the purpose" (as claimed of said Section 343) "would be defeated by the broad interpretation for which plaintiff contends". (R. 21).

But this is in conflict with the California decisions, which hold:

> "We fail to understand upon what theory of construction appellant claims that the relief granted by §685 in case of a money judgment, is limited to enforcement by execution. It is true the text of the section is introduced by the disconnected clause 'execution after five years,' but it is apparent from the text, which provides that 'in all cases the judgment may be enforced or carried into execution after the lapse of five years,' that the word 'execution' is used in the broad sense of execution or carrying into effect by such means as are provided by law for the enforcement of various classes

of judgments." (Saunders v. Simms, 183 Cal. 167, 169, 190 P. 806).

"In Saunders v. Simms (1920) 183 Cal. 167, 190 Pac. 806, a case on 'all fours' with the instant case the Supreme Court held that the word 'execution' in Section 685 is used in its broadest sense, and the 'procedure is not limited to enforcement by execution but includes such means as are provided by law for the enforcement of various classes of judgments." (Vol. 24 Cal. Law Review, p. 226).

(2) Next, the Court below held that

"* * * Section 343 means a right of enforcement which exists at the time the suit is begun here * * *." (R. 22).

"Issuance of execution is not automatic at the judgment creditor's election. It is discretionary with the court. Unless the discretion is exercised, and in the creditor's favor, the judgment is unenforceable." (R. 23).

This was a holding that petitioner must have appealed to the California Court and have obtained an order for issuance of execution, before bringing this action, which is in conflict with the California decisions, which hold that where as here, an execution was issued and returned *nulla bona*, and it is admitted that the debtor had no property when the judgment was entered, and has had none since, except his interest in his grandfather's estate, which cannot be reached by execution, that the creditor need not first obtain the order provided for by §685, and that specifically this is true where all the property that the debtor had has been transferred, and, as here, the assignee denies the debt. (Heyneman v. Dannenberg, 6 Cal. 376; 7 Cal. Jur. §10, p. 801, and the very numerous cases cited).

And the California cases hold also that where, as here, lapse of time is the sole ground on which the granting of an

order under §685 is opposed, the Court is required to grant the order.

> "There must, then, be something added to the mere fact that the expiration of time and that the debtors were possessed of personal property which would move the court to deny the right given by the statute." (McClelland v. Shaw, 23 Cal. App. 107, 72 P. (2d) 225, 227).
>
> "'* * *. In a plain case, this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. * * *.'" (*Id.*).

(See also 11 Cal. Jur. §10, p. 801, and §12, p. 52 and cases cited; Passo v. Bell, 27 Cal. App. (2d) 360, 361, 362; Doehle v. Phillips, 151 Cal. 488, 495, 91 P. 330; Peers v. Stall, *supra*; 24 Cal. Law Review, p. 226).

The Court below next held that:

> "* * * the proceedings * * * constitute, in effect, a method of reviving the judgment, but with relief limited to the issuance of execution." (R. 23).

In so holding the Court below failed to give effect to the California decisions which hold the contrary.

> "* * * the word 'execution' is used in the broad sense of execution or carrying into effect by such means as are provided by law for the enforcement of various classes of judgments." (Saunders v. Simms, *supra.*)

(3) The Court below failed to give proper effect to an applicable decision of this Court. This is an action of exclusive equity jurisdiction under the decisions of the Courts of California and of the District of Columbia and of this Court. (Saunders v. Simms, 183 Cal. 167, 170; Halliday v. Halliday, 56 App. D. C. 179, 183; Hagan v. Walker, 14

How. 29, 33, 14 L. ed. 312, 314, 315; Russell v. Todd, 309 U. S. 280, 289, 292).

The Court below held that said §343 of the D. C. Code, and §336 of the California Code applied both to actions at law and suits in equity, and that this action was barred both in California and here by said §336, and thereby failed to give proper effect to the decision in Russell v. Todd, *supra*, holding:

> "But where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are inapplicable, and in the absence of any state statute barring the equitable remedy in like cases, the federal court is remitted to and applies the doctrine of laches as controlling." (Russell v. Todd, 309 U. S. 280, 289.)

The decisions in California, in the District, and of this Court uniformly hold that where mere lapse of time is the basis of the defense of limitations, and it appears, (as it does here), that the debtor has not been prejudiced, the action is not barred by lapse. (McClelland v. Shaw, 72 P. (2) 225, 23 Cal. App. (2d) 107; see cases under (a) and (b) of Pt. II above; George v. Ford, 25 App. D. C. 291, affd. 203 U. S. 56; Northern Pac. R. Co. v. Boyd, 228 U. S. 482, and cases cited in 21 C. J. p. 233.)

Moreover, as petitioner did not discover the transfer by the debtor to his Mother until after he had brought this action, laches can not be claimed. (R. 3; Richardson v. Michel, 113 P. (2d) 916, Cal. App.; Halstead v. Grinnan, 152 U. S. 412, 417.)

(4) The issue decided below is of general importance and of substance, and relates to the construction and ap-

plication of a statute within the purpose of subdivision (c) of Par. 5 of this Court's Rule 38, and basically relating to the application of §1 of Article IV of the Constitution. Statutes similar to said §343 are in force in most of the States. (34 C. J. §1577, p. 1109.)

So, whenever an equity action is brought in a State or this District and a foreign judgment accorded recognition as evidence of the indebtedness, the question settled by Russell v. Todd, *supra*, will arise, and this Court has not determined that question in a case under a statute similar to §343.

So long as the effect of such statutes remains undecided by this Court, decisions conflicting with one another and with Russell v. Todd, *supra*, are likely in States, while, (the question being of comity under §1 of Article IV of the Constitution), a decision by this Court will control, and infinite litigation be saved.

Because the issue here is of such widespread importance and is substantial, it is within the purview of said Section (c) and involving as it does an erroneous application of the Rule of limitations and of laches, certiorari should be granted. (West v. American Teleph. & Teleg. Co., 311 U. S. 223, 236.)

WHEREFORE, it is respectfully submitted that this petition should be granted.

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BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the District Court of the United States for the District of Columbia (R. 8-10) is not reported, and the opinion of the United States Court of Appeals for the District of Columbia (R. 17-24) is reported in Fowler v. Pilson, *et al.*, 123 F. (2d) 918.

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia was entered on October 13, 1941. (R. 24.) A petition for a rehearing was denied on December 6, 1941. (R. 25.) The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented, Specifications of Errors to be Urged, etc.

A statement of the questions presented, specification of errors to be urged, and a statement of the case will be found in the foregoing petition.

ARGUMENT.

I.

The determination of the case is limited by stipulation to the one question whether "the Judgment * * * is barred by the Statute of Limitations". The Court below erred in not confining itself to this issue and in basing its decision on issues excluded from its consideration. The judgment is not "barred" in California. Petitioner is therefore entitled to recover.

(a) *The stipulation is as follows,—*

"7. That the sole issue to be litigated herein is *whether the judgment* described in the bill of complaint *is barred* by the statute of limitations." (R. 6.)

(b) *No question was before the Court below other than "whether the judgment is barred by the Statute of Limitations."*

"• • • the question considered by the Circuit Court of Appeals was not properly before it and it should have passed upon the merits. • • • *All other questions were taken out of the case by stipulation.*" (Tuker v. Alexander, 275 U. S. 228, 230, 231.)

"Where, in Action of Ejectment, Attorneys Make Stipulation Limiting Issues to Title Then Held by the respective parties, a sheriff's deed to one of the parties, executed after the stipulation was made, is not admissible in evidence, though the deed is given upon a sheriff's sale made before the signing of the stipulation." (Bagley v. Ward, 37 Cal. 121.)

(See also Metro-Goldwyn-Meyer Corp. v. Fear, 104 F. (2d) 892, C. C. A. 9; Phillips v. Patterson, 53 P. (2d) 807 (Cal. App.); U. S. Casualty v. District of Columbia, 107 F. (2d) 652 (App. D. C.).)

(c) *Petitioner was entitled to recover on this single issue: The California authorities hold that a judgment is not barred after five years from its recovery.*

"The judgment in question *was not outlawed.* It is true that *an action upon it was barred, but the bar was only to that particular remedy. The judgment was still enforceable." (In Re* Rebman, 150 Fed. ps. 759, 761, 762. C. C. A. 9.)

"A statute of limitations *bars the remedy,* but does not affect the right." (Powell v. Petch, 136 P. 55, 166 Cal. 329.)

"The statute of limitations is a bar to the remedy only, and does not extinguish, or even impair, the obligation of the debtor." (Puckhaber v. Henry, (152 Cal. 419) 14 Anno. Cases, ps. 844, 846.)

"The judgment" (obtained in 1928 and proceedings started in 1939) "upon which the proceedings are founded," (under §685, Cal. Code), *"was not barred* by the Statute of Limitations • • •." (Pacific Gas • • • Co. v. Elks Duck Club, 103 P. (2) 1030 (Decided June 1940).)

(See also Mason v. Cronise, 20 Cal. 212, Opinion by Judge Field, later a Justice of the United States Supreme Court.)

II.

The Court below erroneously and in conflict with the California decisions held, that this action could not have been brought in California at the time it was brought here: and that petitioner's judgment was incapable then of being otherwise enforced there.

General.

The Court below failed to recognize the spirit of liberality towards the creditor in which the California Courts treat the plea of the statute of limitations. They hold that

"everyone being able should pay his debts. * * * there must, then, be something added to the mere fact of the expiration of time," (which is all there is here), "and that the debtors were possessed of personal property which would move the court to deny the right" (to execution) "given by the statute * * *," (§685). (McClelland v. Shaw, *et al.*, 23 Cal. App. (2) 107; Doehla v. Phillips, 151 Cal. 488, 91 P. 330.)

McGrath v. Butte County, (87 P. (2) 381, Cal. App.), holds that where the question whether the case is within the statute of limitations is doubtful, the court should not indulge in a strained construction in order to support the plea.)

(a) *This action could have been brought in California at the time it was brought here.*

(1) The Court below erroneously held that this is an action upon the California judgment, and that the bringing of it at the time the action was brought here was prohibited by §336 of the California Code (App. *infra*, p. 30) because more than five years had elapsed after its entry; but it is not an action upon the judgment but is an action in equity to set aside a transfer made by the debtor and to impress a lien upon the property transferred.

> "The suit to obtain judgment for payment of a claim in due course of administration is not, as appellant seems to think, an action to establish a new judgment liability, based upon the old; * * *." (Saunders v. Simms, 183 Cal. 167, 170; 190 P. 806.)
>
> "The bill maintained by a judgment creditor to subject to the payment of his demand property fraudulently transferred by the debtor is not, strictly speaking, an action upon his judgment. It is really an action for equitable relief against the obstruction caused

by a transfer, which hinders him in satisfying his claim by the ordinary process of law; * * *." (Sewell v. Price, 128 Pac. Rep. 407, 409; 164 Cal. 265.)

"* * * he" (a creditor) "may bring an action in equity to set aside the fraudulent conveyance and subject the property to the satisfaction of his judgment lien in which case the action is not one on the judgment but is an equitable one for relief against the obstruction caused by the fraudulent transfer which hinders him in satisfying his claim by the ordinary process of law; * * *." (Richardson v. Michel, 113 P. (2d) 916, 920, Cal. App.)

"The creditor's suit is not, strictly speaking, an action on the judgment. It is really an action for equitable relief against obstructions to execution." (7 Cal. Jur. §7, p. 796.)

(See also Sefton v. San Diego Trust & Savings Bank, 106 P. (2) 974, 977, Cal. App.; 14 Am. Jur. §44, p. 701.)

(2) The judgment here is not barred. (See authorities under Pt. I above.) The mere lapse of time is the sole ground for the claim that this action could not be maintained in California or brought here, and does not sustain the claim, particularly as it appears affirmatively that the debtor has not been prejudiced by the delay. In fact, there has been no delay. The California Courts have uniformly permitted the enforcement of judgments in actions similar to that here.

Petitioner did not discover that the debtor had transferred the property in question here,—all the property he had,—to his mother until after this action was brought, and was obliged to amend his complaint, making the mother a party and amending the action as one to set aside the conveyance. (R. 3.)

(a) The mere lapse of time, the sole objection here, is not sufficient objection to the maintenance of this action.

> "Admittedly, the judgment, which was for money loaned to the appellant, had never been satisfied in whole or in part, and *no reason whatever appeared* why in equity and good conscience he should not be compelled to pay the same. The failure of plaintiff to earlier enforce the judgment which appellant should and could have any time voluntarily paid, was entirely without prejudice to any of his legal rights, and did not render the granting of the order an abuse of discretion. Under such circumstances it would appear that the exercise of a sound discretion would require the enforcement of the judgment." (Doehla v. Phillips, 151 Cal. 488, 495, 91 P. 330.)

(b) As there is no California statute barring a judgment, when an action is brought to enforce it after five years, the California Courts determine whether it is enforceable on the doctrine of laches and hold that laches do not apply where there is a mere lapse of time, but it must appear that it would be unjust to enforce it on account of some act of the creditor.

> "The doctrine of laches is not designed to punish a plaintiff, and can be invoked only where to allow a claim would, because of claimant's own acts, have permitted an unwarranted injustice." (McClelland v. Shaw, 23 Cal. App. (2) 107, 72 P. (2) 225.)
>
> "The defense of laches is different from the statute of limitations in this, that in order to operate a remedy because of laches, there must appear, in addition to mere lapse of time, some circumstances from which the defendant or some other person may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice will accrue if the remedy is allowed; * * *." (10 Cal. Jur. §62, p. 523). (See also Doehla v. Phillips, *supra*.)

(c) The following case wherein a creditor was allowed after five years to recover judgment against an estate for

the amount of a previous judgment, and the additional cases cited and described in the opinion, illustrate how far the California Courts go in allowing new actions.

In 1912 the Palace Hotel Company v. Crist, 45 P. (2) 415, 6 C. A. (2) 690, the company recovered judgment against Crist for $2,126.14. Nothing was paid on the judgment. Crist died in 1931. In 1932 plaintiff applied for an order under §685 to enforce the judgment. It was granted. Plaintiff then made a claim against Crist's estate. As it was not acted on, he commenced an action, securing judgment for $5,437.60. Defendant appealed, contending that the cause of action was barred by §336 of the Code of Civil Procedure, providing that an action on the judgment must be commenced within five years, and §408 of the Probate Code forbidding the allowing of a barred claim against an estate.

The Court held,—

> " 'In Faias v. Superior Court, 133 Cal. App. 525, 530, 24 P. (2) 567, 569, construing the effect of Saunders v. Simms, 183 Cal. 167, 190 P. 806, 808, the court used the following language: * * * And when the judgment debtor has died and the statute of limitations has run against the judgment the Court may under this section grant the judgment creditor leave to enforce the judgment by the presentation of a claim against the estate and by the bringing of an action thereon if the claim is rejected.' Under the facts and the law as above cited we are satisfied the complaint herein states a cause of action and is not barred by the statute of limitations above cited." (Palace Hotel Co. v. Crist, 45 P. (2d) 415, 416.)
>
> (See also Phillips v. Price, 153 Cal. 146, 94 P. 617.)

(d) The California reports abound in cases where the Courts have ordered enforcement of judgments when more

than five years have passed since their entry. We cite a few of them,—

Title of Case	Place Reported	Judgment Entered	Judgment Enforced	Years of Delay
In Re Rebman	150 F. 759	1897	1904	7
Pacific Gas Co. v. Elks Duck Club	103 P. (2d), 1030	1928	1939	11
Palace Hotel Co. v. Christ	45 P. (2d), 415, 416	1912	1932	20
Bredfield v. Harlan	154 Cal. 497, 91 Pac. 334	1891	1905	14
Darlhla v. Phillips	151 Cal. 488, 91 Pac. 330	1891	1905	14
Harlan v. Harlan	154 Cal. 341, 98 Pac. 32	——	——	10
Demens v. Huene	98 Cal. App. 748, 265 P. 389, 391	1915	1924	9
McClelland v. Shaw, *et al.*	23 Cal. App. (2d) 107	1915	1924	9

The time within which the Court may enforce or carry a judgment into effect is without limitations, (Doehla v. Phillips, 151 Cal. 488, 91 P. 330; 15 Cal. Jur. §257, p. 257).

(3) The Court below erred in holding that before bringing such an action as this in California it would have been necessary to procure an order under §685 of the California Code: The California cases uniformly hold that under such conditions as are present here it not alone is not necessary to issue execution but execution would be enjoined.

> "After the entry of the judgment writ of execution and *fieri facias* was issued and placed in the hands of the Sheriff of the County where Pilson was then residing. The same was duly returned 'Not satisfied' and

showing no property found belonging to Pilson subject to levy."

"On the date of the filing of this action Raymond H. Pilson had no property here or elsewhere except such interest if any as he may have had in the Benjamin F. Pilson Estate, nor has he had any other property since that time." (Fndgs. of fact (1) and (4) R. 8.)

The amended complaint alleged that the defendant, Raymond H. Pilson had no property in the District of Columbia or elsewhere, except such interest as he had in the estate of Benjamin F. Pilson. The defendants did not controvert this in their answer. (R. bot. 3.)

(a) As both defendants denied the debt, relief could not be had by execution, and this action was necessary.

Execution where granted in a case similar to this is enjoined, and the creditor is remitted to his action in equity.

"The debt and insolvency of the defendant, as well as every other material allegation of the bill except that of fraud, are confessed by the answer; and it would be requiring the plaintiffs to do a vain act if they should be compelled to wait their judgment at law and a return of execution, when it is acknowledged that the only effect would be a return of *nulla bona*, and that the property which they have attached in the meantime would have passed into the hands of bona fide purchasers, under color of a judicial sale, and be lost to them forever." (Heyneman v. Dannenberg (6 Cal. 376) 65 Am. Dec. p. 519, 520.)

"Proceedings supplementary to execution do not enable the creditor to reach property or funds of the debtor in the hands of third persons, when the latter deny the liability or claim title to the property, and hence do not afford the creditor an adequate legal remedy. In such a case the creditor *may proceed by creditor's suit* without first pursuing the statutory remedy. 11 *Nor need he first obtain the order pro-*

vided for by the code in such proceedings, 12 authorizing the creditor to sue the person alleged to have property of the debtor or to be indebted to him, where such person claims an interest in the property adverse to the debtor, *or denies the debt.* 13 Suit being in any event necessary, the creditor may proceed by creditor's bill *without first pursuing the statutory proceedings* which could not give him anything more than a right to sue" (7 Cal. Jur. §10, p. 801.)

"(11) Phillips v. Price, 153 Cal. 146, 94 Pac. 617; Rapp v. Whittier, 113 Cal. 429, 45 Pac. 703; Lewis v. Chamberlain, 108 Cal. 525, 41 Pac. 413; Henderson v. D. S. Denehy Merc. Co., 32 Cal. App. Dec. 459, 191 Pac. 558; Union Collection Co. v. Snell, 5 Cal. App. 130, 89 Pac. 859."

"(12) Code Civ. Proc., §720."

"(13) Nordstrom v. Corona City Water Co., 155 Cal. 206, 132 Am. St. Rep. 81, 100 Pac. 242; Phillips v. Price, 153 Cal. 146, 94 Pac. 617." *(Id.)*

A Justice Court judgment was obtained in 1898, and the Justice made an order directing the executors of the deceased debtor to pay the amount of the judgment in Court. The Superior Court granted an injunction restraining enforcement of the order. The creditors then brought an action and recovered. (Phillips v. Price, 153 Cal. 146, 94 Pac. 617, decided in 1908.)

(b) As stated above, execution was issued on this judgment and returned unsatisfied, and there is no case holding that a second execution is required.

III.

The Court below erred,—(1) in failing to give proper effect to an applicable decision of this Court; (2) in deciding a question of general importance and substance relating to the construction and application of §343 of Title 24 of the District Code, a statute within the spirit and purpose of subdivision (c) of Par. 5 of Rule 38 of this Court, and basically relating to the construction and application of section one of Article IV of the Constitution, which has not been but should be settled by this Court.

For which reasons certiorari should be granted.

(1) The Court below failed to give proper effect to an applicable decision of this Court.

(a) This is an action of original or exclusive equity jurisdiction under the decisions of the Courts of California, (Saunders v. Simms, 183 Cal. 167, 170, 190 p. 806; Sewell v. Price, 164 Cal. 265, 128, p. 407; 7 Cal. Jur. §7, p. 796); and of the District of Columbia, (Halliday v. Halliday, 11 F. (2d) 565; 56 App. D. C. 179, 183), and generally (Hagan v. Walker, 14 How. 29, 33, 14 L. Ed. 312, 314, 315; Russell v. Todd, 309 U. S. 280, 289 to 292; 14 Am. Jur. §44, p. 701).

(b) The Court below held that said §343 of the D. C. Code and §336 of the California Code (App. *infra.*, p. 30), applied both to actions at law, and suits in equity, and that this action was barred both in California and here by said §336 in conflict with the decisions of the Courts of the District and of California, and thereby also failed to give proper (or any) effect to the very recent decision of this

Court in Russell v. Todd, 309 U. S. 280, 289, holding that where, as here, equity jurisdiction is exclusive, laches controls. We quote from the case:

> "But where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are inapplicable, and in the absence of any state statute barring the equitable remedy in like cases, the federal court is remitted to and applies the doctrine of laches as controlling." (Russell v. Todd, 309 U. S. 280, 289.)

The decisions in California, and in the District and of this Court are uniform that where the mere lapse of time is the sole basis of the defense of limitations, and no prejudice to the debtor has occurred, but it appears on the contrary that he was not prejudiced, (as it does here), the action is not barred by laches. (McClelland v. Shaw, 72 P. (2) 225, 23 Cal. App. (2d) 107; see cases under (a) and (b) of Pt. II above; George v. Ford, 25 App. D. C. 291, aff'd. 203 U. S. 56; Northern Pac. R. Co. v. Boyd, 228 U. S. 482, and cases cited in 21 C. J. p. 233.)

Moreover, it appears that no claim of laches can possibly be made: Petitioner had not discovered the transfer by the debtor to his Mother when he brought this action, and only discovered it later. (R. 3; Richardson v. Michel, 113 P. (2d) 916, Cal. App.; Halstead v. Grinnan, 152 U. S. 412, 417.)

(2) The issue decided here is one of general importance and substance, and relates to the construction and application of a statute within the spirit and purpose of subdivision (c) of Par. 5 of Rule 38 of this Court, and basically relating to the construction and application of §1 of Article 4 of the Constitution.

Statutes similar to said §343 (App. *infra.*, p. 30), as to the effect of foreign judgments are in force in most of the States. (34 C. J. §1577, p. 1109.)

So, whenever an action in equity is brought in a State, and a foreign judgment is accorded recognition as evidence of the indebtedness, (14 Am. Jur. §21, p. 690), —a creditor's action or an action *in rem*,—the question settled by Russell v. Todd *supra*, (that laches and not the statute of limitations controls, despite statutes similar to §343), will arise, and this Court has not determined that question in a case arising under a statute similar to §343 but only generally as to all equity cases.

So long as the question remains undecided by this Court in a case as to the effect of such statutes, decisions at variance with one another, and in conflict with Russell v. Todd, *supra*, may, and undoubtedly will, be reached in different States, while (the question being one of comity under §1 of Article 4 of the Constitution), a decision of this Court will control, and an infinite amount of litigation for all time be saved.

Because the issue here is of such widespread and general importance, and is a substantial issue, it comes within the spirit and purpose if not within the language of said subdivision (c).

> "We granted certiorari, 310 U. S. 618, 84 L. ed. 1392, 60 S. Ct. 979, upon a petition which set up that * * * the court below had erroneously applied the Ohio rule of limitations and of laches, all questions of public importance concerning the interrelation of state and federal courts." (West v. American Teleph. & Teleg. Co., 311 U. S. 223, 236.)

Conclusion.

The Court below, it would seem, failed to envisage the broad general purpose and spirit of the California statutes, (App. *infra.*, pp. 30-31), and decisions as to limitations of the times within which to bring actions: The time, (five years), fixed by statute within which to bring an action upon a judgment is very short in fact and as compared with that in other states, but this is more than offset by the provision of §685 for enforcement after five years, construed by the Courts as having a broad meaning, and as applying to all methods of enforcing all classes of judgments. This all embracing provision is supplemented by having no time limit to its application, and by the decisions of the courts that every man is supposed to pay his debts, and, therefore, mere lapse of time is no defense to collection, and unless in addition it appears that it would be unjust to do so on account of some act of the creditor the Court is required to grant the creditor relief.

This as a whole makes a unique, but a fair, kindly, honest and beneficent system, to the application of which petitioner is entitled under §1 of Article IV of the Constitution, which he was denied by the Court below, which, (admitting that the language of §343 (App. *infra*, p. 30) entitled petitioner to such relief), on theories expounded at much length, (covering practically one-half of the opinion), none harmonizing with the California law, but all in conflict with it, held that that statute must be given a narrow and rigid construction, and that the California law that the statute must be given a broad interpretation, and that the California law that a man must pay his debts despite the mere elapse of time must be overruled.

Such a confessedly narrow construction—unjust also as the California Courts view it—denying petitioner his rights under the Constitution, should not stand not alone because unjust to petitioner, and a denial of his Constitutional rights, but far more because it would be a pernicious precedent in both of said respects, and because it fails to give a California judgment the full faith and credit to which it is entitled, which would breed many like cases of denying Constitutional rights, reaching into the indefinite future.

WHEREFORE, it is respectfully submitted that this petition should be granted.

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APPENDIX.

1. Title 24 Ch. 12, p. 340, §343 of the D. C. Code. (Mar. 3, 1901, 31 Stat. 1389, c. 854, sec. 1267; June 30, 1902, 32 Stat. 542, c. 1329):

> "343. Foreign judgments—Every action upon a judgment or decree rendered in any State or Territory of the United States or in any foreign country shall be barred if by the laws of such State, Territory, or foreign country such action would there be barred and the judgment or decree be incapable of being otherwise enforced there.

2. Sections 335 and 336 of the California Code:

> "335. Periods of Limitations Prescribed. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows: (Enacted 1872)
>
> "336. Within Five Years. Within five years: 1. An action upon a judgment or decree of any court of the United States or of any state within the United States. * * *. (Enacted 1872; Amended by Code Amdts. 1873, 1874, p. 291.)"

3. Section 685 of the California Code of Civil Procedure is as follows:

> "685. Execution of Judgment After Five Years; Enforcement of Judgment on Supplemental Proceedings. In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion."
>
> "Judgment in all cases may also be enforced or carried into execution after the lapse of five years from the date of its entry, by judgment for that purpose

founded upon supplemental proceedings; but nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by limitation at the time of the passage of this act. (Enacted 1872; Amended by Stats. 1895, p. 38, and Stats. 1933, p. 2499.)"

4. Section 34 of the Federal Judiciary Act (28 USCA §725) is as follows:

"*§725. Laws of States as rules of decision.* The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply (R. S. §721.)"

(12)

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No. 994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

WILLIAM ERIC FOWLER,
Petitioner,

v.

RAYMOND H. PILSON, *et al.*

BRIEF OF RAYMOND H. PILSON, ETHEL S. PILSON AND PAUL W. SAMPSELL, TRUSTEE IN BANKRUPTCY OF RAYMOND H. PILSON, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ARTHUR HELLEN,
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Washington, D. C.

PRESS OF FRANC. E. SHEIRY WASHINGTON, D. C.

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STATEMENT OF FACTS.

On October 23, 1930, one G. B. Ahlmann recovered a judgment against Raymond H. Pilson in the Superior Court of Los Angeles County, California. Writ of Execution was issued and duly returned unsatisfied, no appeal was taken and no payment has been made on account. Subsequent to

its recovery, the judgment was assigned to William Eric Fowler, the petitioner herein. (R. 8)

On November 13, 1937, petitioner as assignee filed this action in the District Court of the United States for the District of Columbia based on that judgment, the defendants being Raymond H. Pilson and the Trustees under the will of Benjamin F. Pilson, late of the District of Columbia, deceased. Petitioner alleged that Raymond H. Pilson had a substantial interest in the estate of the testator, his grandfather. The purpose of the action was to have the California judgment decreed to be a lien upon and against that interest. (R. 2)

The complaint alleged that if Pilson then had property in California, petitioner under Section 685 of the California Code of Civil Procedure could have execution issued and, therefore, the judgment was not barred in the District of Columbia, particularly by Section 343, Title 24, D. C. Code. (R. 2)

On December 30, 1937, petitioner alleged in an amended complaint that Pilson in April, 1932, executed two certain instruments purporting to assign his interest in the above estate to his mother, Ethel S. Pilson, and that said instruments were void and of no effect. Ethel S. Pilson was made a party defendant. (R. 3)

Defendants, Raymond H. Pilson and Ethel S. Pilson answered, denying that the judgment was in full force and effect and setting up as a defense on the merits that the action was barred by Section 343, Title 24 of the D. C. Code and Sections 335 and 336 of the California Code of Civil Procedure. (R. 3-4)

The Trustees of the Benjamin F. Pilson Trust set up as a defense on the merits the same Limitations Statutes. (R. 4)

Prior to the hearing on the merits a written stipulation was entered into by all the parties, which in part was as follows (R. 5-6):

> "3. Said Ethel S. Pilson waives any rights by reason of said assignments and makes no claim thereunder; and said plaintiff and said defendants agree that the assignments shall be considered and treated as though the same had not been made."
>
> "7. That the sole issue to be litigated herein is whether the judgment described in the Bill of Complaint is barred by the Statute of Limitations."

Subsequently, Raymond H. Pilson filed a voluntary petition in bankruptcy, Paul W. Sampsell was appointed Trustee, qualified as such and by leave of court intervened and became a party defendant. (R. 9)

ARGUMENT.

The facts are not in dispute. This is an action in the District of Columbia on a California judgment. The judgment was obtained in 1930 and suit was instituted in 1937. In spite of the involved reasoning in the petition and brief, the sole issue is whether such action is barred by Section 343, Title 24, District of Columbia Code, which is as follows:

> "Foreign Judgments.—Every action upon a judgment or decree rendered in any State or Territory of the United States or in any foreign country shall be barred if by the laws of such State, Territory, or foreign country such action would there be barred and the judgment or decree be incapable of being otherwise enforced there."

For a determination of this question reference to the appropriate California statutes is obviously necessary.

Sections 335 and 336, California Code of Civil Procedure, are as follows:

"335. PERIODS OF LIMITATION PRESCRIBED. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows: (Enacted 1872).

"336. WITHIN FIVE YEARS. Within five years: 1. An action upon a judgment or decree of any court of the United States of any state within the United States * * * (Enacted 1872; Amended by Code Amdts. 1873-74, p. 291)."

Clearly under these sections and their interpretation by the California Courts, had action been instituted in California on the date the suit was filed in the District of Columbia such action would be barred.

Mason v. Cronise, 20 Cal. 211;
Simpson v. Simpson, 21 Cal. App. 150, 131 P. 99;
Murphy v. Davids, 55 Cal. App. 416, 203 P. 802.

However, petitioner asserts that by reason of Section 685 of the California Code of Civil Procedure (R. 2-3), although he took no step under it, he may maintain this action in the District of Columbia. This contention is at variance with the purpose of the Section and with the California cases interpreting it. The effect of this section is simply to enable a judgment creditor after the lapse of five years to petition the Court in which the judgment was rendered for authority to have execution issued. The privilege of proceeding under this section does not render the judgment enforceable. Whether or not the judgment may be enforced, to the limited extent set forth in the section, is entirely dependent upon the favorable exercise of a discretion lodged by statute in the trial court in California.

McClelland v. Shaw, 23 Cal. App. (2) 107, 72 P. (2) 225;
Shields v. Superior Court, 138 Cal. App. 151, 31 P. (2) 1045;
Faias v. Superior Court, 133 Cal. App. 525, 24 P. (2) 567;

Doehla v. Phillips, 151, Cal. 488, 91 P. 330;
Thomas v. Lally, 28 Cal. App. 308, 152 P. 53.

At the time suit was commenced in the District of Columbia this judgment was dormant.

Faias v. Superior Court, supra;
Tolle v. Doak, 12 Cal. App. (2) 195, 55 P. (2) 542.

The time to which Section 343 of the District of Columbia Code relates is the date of the commencement of the action, not to the possibility of enforcement at some future time. This judgment was "incapable of being otherwise enforced" in California on the date suit was filed.

Chapman v. Chapman, 48 Kan. 636, 29 P. 1071;
General Electric Co. v. Hurd, 171 F. 984;
Swift & Co. v. Weston, 88 Mont. 40, 289 P. 1035;
Tourtelet v. Booker, 160 S. W. 293.

Petitioner's contention is that because of the possibility of enforcement by execution under Section 685 of the California Code, although such a method may never be asked for or granted, and although action on the judgment in California is barred, this section enables a judgment creditor to file suit in the District of Columbia without any limitation as to time.

Such a construction of Section 343 would render it totally inoperative to accomplish the purpose obviously intended by its enactment.

Petitioner contends that the Court below did not give to the California judgment full faith and credit as required by Sec. 1 of Article IV of the Constitution and by Sec. 34 of the Federal Judiciary Act.

Under its decision this judgment is given the same effect as it had in California. No more is required and no more should be given. To hold otherwise would improperly ex-

tend the full faith and credit doctrine and deprive respondents of the right to interpose the same defense to a suit in the District of Columbia as could have been interposed had suit been filed thereon in the courts of California.

The opinion of the Court below (R. 17-24) clearly expresses these principles and reference is made to it.

It is respectfully submitted that the Court below has not committed any of the errors assigned by petitioner as reasons for granting the writ and that the petition should be denied.

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